

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENNETH I. DEANE,

Plaintiff,

v.

THE PACIFIC FINANCIAL GROUP
INC., et al.,

Defendants.

CASE NO. C19-722 MJP

ORDER ON MOTION TO AMEND
COUNTERCLAIMS

The above-entitled Court, having received and reviewed:

1. Defendants' Motion to Amend Counterclaims (Dkt. No. 46),
2. Plaintiff's Response in Opposition to Defendants' Motion to Amend Counterclaims (Dkt. No. 50),
3. Defendants' Reply in Support of Motion to Amend Counterclaims (Dkt. No. 53),

all attached declarations and exhibits, and relevant portions of the record, rules as follows:

IT IS ORDERED that the motion is GRANTED; Defendants shall file their amended answer and counterclaims within five days of the date of this order.

Background

Plaintiff worked for Defendant The Pacific Financial Group (“TPFG”) for over eleven years, rising to Executive Vice-President for Eastern Sales. His employment was terminated in January 2019; later that year he accepted a position with Advisors Capital Management (“ACM”).

Plaintiff filed his complaint in May 2019. Dkt. No. 1. Defendants filed their answer in August 2019. Dkt. No. 21. The case schedule set a discovery deadline of February 20, 2020. Dkt. No. 19. Defendants propounded their first set of discovery requests on October 18, 2019, received responses on December 3 and followed up with supplemental requests on January 3, 2020. Plaintiff did not respond with supplemental responses until February 26. Responses to a second set of discovery requests (sent on December 30) were not received until February 17.

According to the case schedule, the deadline for amending pleadings was September 6, 2019. Dkt. No. 19.

Discussion

Defendants assert that the discovery they finally received revealed evidence of alleged additional impropriety on Plaintiff’s part, including:

1. Sharing Defendants’ confidential information with ACM and soliciting Defendants’ referral sources to work with ACM, and
2. Breaches of his contractual duties of confidentiality and loyalty by providing ACM with protected information while still employed with TPFG.

Based on FRCP 15’s liberal policy favoring amendments, the nonmoving party bears the burden of demonstrating why leave to amend should not be granted. Luke v. City of Tacoma, 2018 U.S. Dist. LEXIS 141008, 13 (W.D. Wash. 2018)(citing Genentech, Inc. v. Abbott Labs.,

1 127 F.R.D. 529, 530-31 (N.D. Cal. 1989). The following factors are relevant when considering
 2 whether to allow an amendment:

- 3 1) Undue delay
- 4 2) Bad faith or dilatory motive
- 5 3) Repeated failure to cure deficiencies¹
- 6 4) Prejudice to the opposing party
- 7 5) Futility of amendment

8 Foman v. Davis, 371 U.S. 178, 182 (1962). The Court will examine the request through the lens
 9 of the applicable factors.

10 Undue delay

11 While Plaintiff is correct that a portion of the evidence cited by Defendants in support of
 12 the amended counterclaims was produced in early December 2019, (a) the materials were still
 13 received after the amendment deadline and (b) the other portion of the materials cited were not
 14 received until mid-February 2020. Defense counsel also filed a declaration indicating that she
 15 sent Plaintiff's counsel a copy of the proposed amendments on January 22, 2020 and did not hear
 16 back from Plaintiff's attorney until Feb. 12 (indicating that Plaintiff would oppose the
 17 amendment). Dkt. No. 47, Decl. of Demmon, ¶ 20. The motion was filed three weeks later. The
 18 Court finds no undue delay.

19 Bad faith

20 The Court is unconvinced by Plaintiff's attempt to turn a draft email by his former
 21 employer containing some very inflammatory and ill-considered language into evidence that this
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23
 24 ¹ Neither side maintains that this is a factor here.

1 motion is motivated by hostility. The email was never sent and is entirely insufficient as proof
2 that the requested amendment is somehow improperly motivated.

3 Prejudice to opposing party

4 The Court fails to see how the time which Plaintiff spent responding to Defendant's prior
5 TRO request functions as evidence of prejudice to Plaintiff should Defendants be permitted to
6 file amended counterclaims. Plaintiff also cites the time required to respond to the new claims
7 and the fact that additional discovery will be required as further proof of prejudice. No authority
8 is cited indicating that either of these constitutes sufficient prejudice to deny an otherwise valid
9 amendment request. On the contrary: "Delay alone is not sufficient to establish prejudice, nor is
10 a need for additional discovery." Mansfield v. Pfaff, C14-0948JLR, 2014 U.S. Dist. LEXIS
11 105997 at *10 (W.D. Wash. Aug. 1, 2014).

12 Futility of amendment

13 The Court finds the standard to which Plaintiff wants to hold Defendants' proposed
14 claims goes beyond Iqbal/Twombly to almost summary judgment levels. Plaintiff attempts to
15 challenge the factual basis of the new claims as *proof* of the cause of action – that is not the
16 standard. The issue is whether Defendants' claims are facially plausible; "[a] proposed
17 amendment is futile only if no set of facts can be proved under the amendment to the pleadings
18 that would constitute a valid and sufficient claim or defense." Hofschneider v. City of
19 Vancouver, 182 F.Supp.3d 1145, 1150 (W.D. Wash. April 21, 2016).

20 Plaintiff's attack on Defendants' proposed "constructive resignation" claim is particularly
21 unpersuasive. He argues that the cause of action has been rejected in Washington "when
22 analyzing unemployment compensation cases" (Response at 8), but this is not an unemployment
23 compensation case. And the Washington Court of Appeals case recognizing the cause of action
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1 of “constructive resignation” (Govier v. North Sound Bank, 91 Wn.App. 493 (Div. 2, 1996)) has
2 never been overturned. Plaintiff goes on to argue that the facts of this case do not support the
3 legal theory, but the Court will not weigh the facts at this stage. Defendant has plead sufficient
4 facts which, if proven, plausibly support the claim.

5 **Conclusion**

6 Plaintiff has failed to carry his burden of demonstrating why Defendants should not be
7 permitted to amend their counterclaims as requested. The motion to file an answer with
8 amended counterclaim is granted, and Defendants must file that amended answer within five
9 days of the date of this order.

10 The clerk is ordered to provide copies of this order to all counsel.

11 Dated May 13, 2020.

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13 Marsha J. Pechman
14 United States Senior District Judge
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